In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1333

JULIAN G. CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a retired United States Air Force officer, seeks review of a decision of the court of appeals holding that his cause of action for additional retirement pay is barred by *res judicata* or collateral estoppel. The decision is correct, and further review is not warranted.

1. On October 10, 1949, while on active duty, petitioner was hospitalized for a liver ailment, which led to his retirement on June 30, 1950, with a 30-percent disability rating (Pet. App. 3, 9). In 1965, petitioner filed an action in the Court of Claims alleging that the original Section 415 of the Career Compensation Act of 1949, 63 Stat. 825 (the Act), had given him the right to elect to have his disability retirement pay computed on the basis of prior laws which entitled him to remuneration at 75

percent of his base pay rather than 30 percent, and that a 1950 amendment to Section 415 (64 Stat. 158; Pet. App. 3, n. 1, 2) unlawfully removed him from the category of those eligible to make such an election (Pet. App. 4).

However, in order to be eligible for the election provided by the original or amended Section 415, petitioner had to have been hospitalized on October 1, 1949, the effective date of the Act (Pet. App. 4, n. 4, 10), which he admittedly was not. The Court of Claims thus held that petitioner's claim did not fall within the provisions of the original or amended Section 415 and denied him relief (Pet. App. 4 and n. 4, 8). This Court denied certiorari. *Carr* v. *United States*, 383 U.S. 968.[1]

In October, 1973, petitioner brought this declaratory judgment action, specifically claiming that the Career Compensation Act of 1949, as amended in 1950, has deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Pet. App. 13-14). Petitioner contended that if the amended Section 415 is held unconstitutional, he would have the benefit of the higher retirement disability rating under the original Section 415.

As noted above, however, the Court of Claims held in 1965 that petitioner was ineligible to receive the benefit of the election provided by the original or amended Section 415 (Pet. App. 8). The district court thus held that petitioner's 1973 action was barred by *res judicata* (Pet. App. 15), and the court of appeals correctly affirmed on that ground (Pet. App. 5-6).[2]

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[1]Petitioner has reproduced the government's opposition to that petition for certiorari at Pet. App. 9-12.

[2]In addition, the court of appeals noted that collateral estoppel would also bar his claim (Pet. App. 6, n. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.